S.B. Criminal Misc. Petition No.1104/2004.
(Ashok Kumar Swarnakar Vs. Manoj Kumar)

DATE OF ORDER : May 11, 2006

P R E S E N T

Hon'ble Mr. Justice Gopal Krishan Vyas

Mr. Sandeep Saruparia for petitioner.

BY THE COURT :

Heard learned counsel for the petitioner.

In this case, by order dated 22.7.2005 notice was issued to the non-petitioner. Office report dated 22.9.2005 shows that notices have duly been served. Despite service, none appears for and on behalf of the non-petitioner.

The complainant petitioner has challenged order dated 16.11.2004 passed by the Civil Judge (Jr. Dn.) & Judl. Magistrate, Rajsamand in Criminal Case No.414/2003 dismissing the complaint under Section 138, Negotiable Instruments Act on the ground of non-appearance of the complainant.

It is contended by learned counsel for the petitioner that the case was fixed on 15.11.2004 but, on that date, there was government holiday and, therefore, file was taken up for proceedings on

16.11.2004. It is submitted that on 16.11.2004 the petitioner was not present before the Court and the accused was also not present but an application for exemption of attendance of the accused was filed and while allowing the application of the accused the complaint was dismissed for non-appearance. Learned counsel for the petitioner argues that the impugned order is bad in law because the date in the proceedings was fixed 15.11.2004. He argues that on 16.11.2004 his counsel Mr. Anil Joshi was out of town and on his behalf memo of appearance was filed by Advocate Shri Mahendra Sanadhya but the learned trial Court did not accept the brief-application and dismissed the complaint on the ground of non-appearance of the complainant. Learned counsel for the petitioner relies upon the judgment of the Supreme Court, reported in **AIR 1998 S.C. 596**, Associated Cement Co. Ltd. Vs. Keshvanand.

I have perused the judgment cited by learned counsel for the petitioner. Para 18 of the said judgment runs as under :

> "Reading the Section in its entirety would reveal that two constrains are imposed on the Court for exercising the power under the Section. First is, if the Court thinks that in a situation it is proper to adjourn the hearing then the Magistrate shall not acquit the accused. Second is, when the Magistrate considers that personal attendance of the complainant is not necessary on that day the Magistrate has the power to dispense with his

> attendance and proceed with the case. When the Court notices that the complainant is absent on a particular day the Court must consider whether personal attendance of the complainant is essential on that day for the progress of the case and also whether the situation does not justify the case being adjourned to another date due to any other reason. If the situation does not justify the case being adjourned the Court is free to dismiss the complaint and acquit the accused. But if the presence of the complainant on that day was quite unnecessary then resorting to the step of axing down the complaint may not be a proper exercise of the power envisaged in the section. The discretion must, therefore, be exercised judicially and fairly without impairing the cause of administration of criminal justice."

Obviously, the date was fixed in the case on 15.11.2004 and there being government holiday on 15.11.2004 the proceedings in the case was taken up on 16.11.2004. The trial Magistrate can dismiss the complaint under Section 256 of the Code of Criminal Procedure in the event of failure of the complainant to be present before the Court; but, from the aforequoted observation of the Supreme Court, it is manifest that such power must only be exercised judicially and fairly without impairing the cause of administration of criminal justice. The impugned order does not reveal any circumstance in which the learned Magistrate had no course open than to dismiss the complaint on 16.11.2004 when the complainant did not turn up before the Court.

In the interest of justice, the petition is allowed. Order impugned dated 16.11.2004 is set aside. The complaint stands restored. Let the trial Court proceed with the case in accordance with law.

(Gopal Krishan Vyas) J.